From: Andy Tripp
To: Microsoft ATR
Date: 1/28/02 12:04am
Subject: Microsoft Settlement

To: microsoft.atr@usdoj.gov
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Date: January 27, 2002
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To: Renata B. Hesse
Antitrust Division
U.S. Department of Justice
601 D Street NW
Suite 1200
Washington, DC 20530-0001

Attached is my comment on the proposed Microsoft settlement:

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Introduction

I wish to comment on the Microsoft Proposed Final Judgement[1] (PFJ) settlement as provided for under the Tunney Act[2].

About Me

My name is Andy Tripp and I am a software developer in the Telecommunications Industry. I've been developing, testing, and supporting software in the industry for 17 years. I have no attachment with either Microsoft or any of its competitors. While I use the Java programming language (which Microsoft has been hostile to), I would say that I am impacted by the Microsoft case in much the same way that most people in the software business are. While I am more openly critical of Microsoft than most, I would say I'm a fairly typical software professional. Having worked for AT&T and its offspring for 15 years, I also know a little more about monopolies and divestiture than most. Being a member of the "Slashdot crowd" (a technical news site), I also tend to follow Microsoft and it's legal cases more closely than most.

About This Document

This document has three parts. In Part 1, I highlight some of the reasons why the Proposed Final Judgement (PFJ) does **not** serve the public interest by noting where it falls short and by pointing out potential loopholes. Because most of the problems of the proposed settlement have already been pointed out by others, I rely heavily on quotes from others here.

In Part 2, I explain why I think that nothing short of splitting Microsoft into three companies will restore competition to the OS and Web Browser markets. While a forced divestiture may seem extreme, I'll try to make the case that it's the only way to restore competition.

In Part 3, I ask for a heavy fine against Microsoft as a deterrent to future illegal conduct. I suggest some starting numbers for calculating what would be an appropriate fine, emphasizing that the fine must be large enough to be an effective deterrent.

Here is the outline of this document:

Problems With The Proposed Final Judgement

API Disclosure

There are certainly many loopholes in the area of API disclosure. Zimran Ahmed [3] points out these problems, among other things:

- The fact that the definition of "middleware" excludes "outside the context of general Web browsing" doesn't make much sense. And the phrase "that designated Non-Microsoft Middleware Product fails to implement a reasonable technical requirement..." gives Microsoft an easy "out" to determine for itself what's "middleware" and what's not.
- The definition of "Communications Protocol" is too narrow and seems to exclude SAMBA [4].
- Microsoft would not have to disclose any API related to security. It would be easy to label just about anything "security-related".
- Microsoft would not have to disclose any API to any group that meets "reasonable, objective standards established by Microsoft for certifying the authenticity and viability of its business." That would exclude open source as well as government, educational institutions, standards bodies, etc. There is no reason to exclude these groups.

Another major problem with the API disclosure is that it forces those who use the APIs to share their finished code with Microsoft. There is no reason to force companies to expose anything to Microsoft.

OEM Provisions

The PFJ's treatment of Microsoft's relations with OEMs has a fatal flaw: Even if Microsoft is prohibitted from relatiation, it would be corporate suicide for an OEM to cross Microsoft. To quote the Computer and Communications Industry Association[5]:

> *...even its limited provisions (API disclosure, icon removal, etc.) rely exclusively on OEMs to provide a competitive alternative to Windows...there is no likelihood that any OEM will use its small freedoms under the settlement to choose to compete with Microsoft.*

This trial has shown that OEMs have been bollyed by Microsoft so badly that they have good reason to fear retaliation if they step out of line.

Former Netscape CEO James Barksdale describes the Microsoft/OEM relationship "Finlandization"[6]:

During the Cold War, we used to refer to a concept known as Finlandization. What this referred to was that Finland was nominally free of the Soviet Union, but was so threatened by it, it could not act unilaterally without tempering its actions so as not to offend its giant neighbor which could crush it at will. The technology industry now, and after the settlement with DOJ, is still effectively, Finlandized by Microsoft. It is still dominated, and will still cower in fear of the monopolist unbound.

Desktop Icons

The PFJ ensures that non-Microsoft companies may get their icons on the Windows desktop, but the clause only applies to companies who have sold more than a million copies of their software in the United States. There does not need to be any such limitation. Hardware vendors, service providers, and all kinds of non-software companies might want to pay OEMs to put their icon on the desktop.

Technical Comittee

The three-person technical committee (TC) that the PFJ proposes has some serious problems. First, the fact that Microsoft would be allowed to choose one member, who would in turn help to choose a second, is troubling. No convicted criminal gets to choose his guards, his judge, his jury, or even his parol officer, and Iraq does not get to choose its weapons inspectors. Microsoft would surely choose someone who is biased in favor of the company.

As the TC would work in secret, so there would be no public pressure on Microsoft to simply ignore them.

The TC would have no specific enforcement power. All they could do is report back to the DoJ on what's happening inside Microsoft.

The TC members would be payed by Microsoft. That creates a conflict of interest.

Conclusion: The many loopholes in the PFJ Need to Be Closed

The PFJ has been widely critisized [7,8] and software industry is virtually unanimous in it's characterization of the PFJ as being full of loopholes and ineffective. The more generous critiques call it a "slap on the wrist". I believe the most common view of it was put simply by Massachusetts Attorney General Tom Reilly, when he said[9] that the deal was "full of loopholes and does little more than license Microsoft to crush its competition."

Part 2: Microsoft Should Be Split Into Three Companies

In this section, I will explain why I think that the PFJ is not sufficient to stop the unlawful conduct of Microsoft and restore competition to the OS and Web Browser markets. I propose splitting Microsoft into an Operating Systems (OS) company, a Web Browser company, and an Applictions (and everything else) company.

Justification for a Microsoft Breakup

While most of the remedies in the PFJ attempt to "terminate unlawful conduct" and "prevent repetition in the future", none even come close to attempting to "revive competition in the relevant markets". In his legal summary of the Microsoft case[7], Paul M. Kaplan states:

> *Finally, the Court highlighted its major concerns with its entry of the Final Judgment – namely, "to terminate the unlawful conduct, to prevent its repetition in the future, and to revive competition in the relevant markets". Supra at 3. United States v. United Shoe Machinery Corporation, 391 U.S. 244 (1968) provides guidance as to the judicial relief that should be granted where a defendant is found guilty of violating § 2 of the Sherman Act. In that case, the Court stated that the appropriate relief in a "Sherman Act case should be to put an end to the combination and deprive the defendants of any of the benefits of the illegal conduct, and break-up or render impotent this monopoly power found to be in violation of the act. In short, the remedy should achieve its principal objects, 'to extirpate practices that have caused or may hereafter cause monopolization and restore workable competition in the market'." Supra at 252*

The remedy must be strong enough that in the future, people look back and say "there is now competition in both the PC Operating Systems market and the Web Browser market because of the Microsoft trial."

The CCIA[5] also points out that the settlement does not address the core monopoly problem:

> *the DOJ settlement would not restrict the core way in which Microsoft unlawfully maintained its Windows operating system (OS) monopoly, namely bundling and tying competing platform software (known as "middleware") like Web browsers and Java, to the OS*
>
> ...
>
> *the DOJ settlement has no provisions to create competition in the OS market that Microsoft unlawfully monopolized.*
>
> ...
>
> *the DOJ settlement has no provisions directed to new markets where Microsoft is using the same bundling and restrictive practices to preserve and extend its Windows monopoly. Typified by Windows XP, which ties Internet services, digital media software and instant messaging (among other features) to Windows, Microsoft is demolishing potential competition in these new markets just as it did in 1995-98 to Netscape. The Court of Appeals ruled that a remedy must "ensure that there remain no practices likely to result in monopolization in the future," but the DOJ deal does not even try to restrict ways in which Microsoft could (and already has) leverage its Windows monopoly in the future.*

In fact, as the CCIA mentions above, Microsoft is continuing its illegal practice. Today, Microsoft not only enjoys an OS monopoly, it now enjoys a Web Browser monopoly and an "Office Applications" monopoly. It is using the same tactics that it's been conviced of to extend its OS monopoly to a "Media Player" monopoly and "Instant Messanger" monopoly. Microsoft claims[10] that many of these "applications" are or should be integral parts of the operating system. But in fact, viable markets already exist for these applications. The Web Browser market was once very profitable for Netscape. Many non-Microsoft "Office Applications" have done fine in the past, and certainly there are many "Media Player" and "Instant Messager" providers today.

Why Internet Explorer Should be A Separate Company

In my opinion, there is simply no way to restore competition to the Web Browser market other than to separate the IE application from the rest of Microsoft. Anything short of that would allow Microsoft to fund IE development from it's monopoly-generated funds. If IE were forced to be self-sufficient, it would help to level playing field with other web browsers - both existing and potential new ones. Microsoft would argue that Netscape is funded by AOL, and thus would have an unfair advantage. This is true, but some advantage is

now needed to restore competition now that IE has around 85% market share. By analogy, AT&T had far more restrictions place on it after its divestiture than its competitors. This was necessary to attempt to create competition. It's true that all else being equal, it would be unfair to only restrict Microsoft. But all else is **not** equal: Microsoft has been convicted of illegally maintaining and extending its OS monopoly to the browser market.

Microsoft would also argue that the consumer would be harmed because IE today is free. IE in fact is not free. Consumers are simply paying for it as part of the price of Windows.

The separation of IE from the rest of Microsoft would be necessary but not sufficient to re-establish competition in the web browser market. There would need to be the regulations you might expect to ensure that it's really separate: No cross-ownership, no special agreements, no comingling of code, etc. between these two companies. And just as local phone companies could not enter the long distance market until they had competition in their local market, The IE company would need to be restricted from the OS market, and the OS company from the browser market, until competition existed.

The CCIA and SIIA organizations filed a "friend of the court" brief[12] in which they forcefully argue the need for not just the OS be split from the rest of Microsoft, but for the Web Browser part of Microsoft to be separated also. Judge Jackson seemed to feel that this was the best solution, but as it was not the one recommended by the prosecution, it would have been inappropriate to impose it. But two things have changed since then. First, the effects of Microsoft's illegal activity continues to give IE increased market share and erode the competition in the Web Browser market. With over 85% of browser market share, Microsoft now has (or is close to having) a monopoly on the browser market, which it didn't have just two years ago. Second, the DoJ, under a new administration, has not only dropped it's efforts for a structural remedy, it has agreed to this very weak PFJ. To some extent, the DoJ has "switched sides", now siding with Microsoft on a weak remedy. While there was little reason to second-guess the 2-way split supported by the previous DoJ prosecutors, there seems to be plenty of reason to question whether the current DoJ is doing what's in the public interest.

As you might guess, others[13,14] have also recommended this 3-way split.

Why Windows Should be A Separate Company

Separating IE from the rest of Microsoft would attempt to remove the illegally established monopoly in web browsers, but there still is the issue of Microsoft continuing to extend its OS market to other markets, such as Media Players, Instant Messaging, Virus software, etc. The court found that Microsoft attempted to maintain its monopoly through restrictive OEM contracts, and illegally extend it through web browser tying. But, of course, it did **not** find Microsoft illegally extend their OS product to these other areas, as Microsoft only started to bundle these recently. But the principle is the same: to tie an application that is in a competitive market into the monopoly OS. The remedy **must** take steps to stop this activity. By analogy, when someone is convicted of stealing from a bank, the remedy should also prevent or discourage him from stealing from anywhere else. In fact, the remedy should discourage him from breaking **any** law even remotely related to the original crime.

So how to prevent Microsoft from its ongoing practice of taking over markets by extending Windows to include them? The only way to do this is separate the OS into its own company. This remedy has wide acceptance as the most effective solution, including several thorough briefs[11] supplied to the court. I believe this remedy is the only way to prevent Microsoft from continuing to illegally maintain and extends its OS monopoly. A large fine may discourage it, but only a structural remedy would prevent it.

The Windows product must be split into a completely separate company from all other products in order to

stop it from growing by consuming other application areas, and thus illegally extending its monopoly. The company would need to have the obvious restrictions: No cross-ownership, no special deals with other companies, and no extension into other markets. In addition, as was the case for AT&T, it would need to be profit-regulated to ensure that it does not overcharge customers.

How to Determine "Operating System" vs. "Application"

The difficult part of enforcing such a split would be on the technical issue of not allowing the OS to grow into "application" areas. Bill Gates, in his disposition[10], lists many "gray areas" which are not considered part of the dictionary-definition of "Operating System", but which recently have tended to be delivered as part of the operating system:

- Font management
- Disk backup, optimization, compression
- A shell (DOS/Unix command line)
- A help system
- Anti-virus software
- Remote boot capability
- Graphics support
- A control panel
- email capability
- demos to show off OS features.

This is just a rough list off the top of his head; there are probably hundreds of such areas that some might consider "part of the OS", and others would consider "applications". In this deposition, the DoJ presented dictionary definitions of "Operating System" and "application", and then noted that the web browser was always referred to, even by Microsoft, as an "application". But Microsoft has a valid point here: many features are delivered with the OS these days, and the consumer does benefit from their inclusion.

How do we determine whether these and other "pre-packaged applications" may be included in the OS or not? My proposal is to ask a simple question:

- Has there been, is there, or could there be, a viable market for the feature as an application that's separate from the OS?

Certainly, there are many email applications for sale out there. There is healthy competition in the anti-virus software market. There are businesses who's products are disk management. And there are alternative "shell" products such as MKS Toolkit. Microsoft could argue that the Operating System would be better if these where included, but that's not the point. The point is that they did (or do, or might someday) also exist as "applications" within a viable market where competition exists.

Another analogy: Certainly a car would be "better" if it included any number of built-in features: a car stereo, a map, a compass, a thermostat, etc. And in a competitive market, no one would restrict a car company from including such features. But if one car company had a monopoly, inclusion of more and more of these features would destroy the existing markets for these products and would be illegal under the Sherman Act. Only features which are absolutely critical for the car to function (such as tires and an engine) should be allowed to be packaged by the convicted monopolist.

How to Enforce Separation: A Technical Committee

If we had a separate Microsoft OS company, it would need to be restricted from entering any area where a viable market already exists. Further, we would need an enforcement mechanism by which this company would be forced to remove or disable any feature that has a viable market outside of the OS. Certainly there are vibrant disk management and anti-virus markets today, and Norton (the leading non-Microsoft player in this market) and others should get the benefit of having these features unbundled. In addition to an **existing** market being criterion for unbundling, a past market should be grounds also. So Opera or Netscape/AOL should not have to prove that the browser market is still competative, just the fact that Netscape dominated a non-OS web browsing market in the past should be justification for unbundling it from the OS. More recently, certainly AOL dominates an "instant messaging" market and Real Networks is in a viable "media player" market. On the other hand, I don't know if there is a viable market for "font management" or "control panel" or "OS demo" or "remote administration" markets outside of the OS itself.

The determination of whether a product is (or could be) a "viable application" as opposed to only an "OS feature" should not be left to the traditional court process because it is too slow. In the fast-moving software industry, it's just not practical have a trial and take years to make such a determination. With Microsoft now bundling Media Player in Windows XP, for example, Real Networks could easily be long gone two or three years from now.

I propose an independant panel or "Special Master" appointed by the court to determine whether a particular feature once had, does have, or could reasonable have, a viable market as an application. This panel would analyze the feature from an economic point of view, not a technical one. In this way, it would not be enough for Microsoft to simply claim "It would be cool to browse your local disk using your web browser." or "It would be convenient for the user to have a disk compression utility built in to the OS." Instead, Microsoft would be required to show that disk compression software (for example) is not a viable application, never was a viable application, and never could be a viable application outside of the OS itself. Non-Microsoft companies could petition the panel to have a feature considered to be an application, and if the committee agreed, it would have the power to force the Microsoft OS to unbundle it from the OS.

Such a "technical committee" should differ from the TC proposed in the PFJ:

- It should be independent of Microsoft
- All it's activities should be public
- It should have enforcement powers
- Its members should be selected by the court

How a Microsoft Breakup Would Restore Competition

How would a three-way company split and a Technical Committee as outlined above stop the ongoing extension of Windows? First, the committee would certainly have one ruling already decided: there certainly was once a viable web-browser application market, and Microsoft should be immediatly forced to unbundle it. Companies such as AOL, Real Networks and Norton could immediately petition the TC to have instant messanging, media player, Virus and Disk management be declared viable markets, and Microsoft would be forced to unbundle these features from the OS. Over time, more an more features would be unbundled from Windows, until eventually all that would be left is what the dictionary says is an Operating System: just the "kernel" and basic device management. The Technical Committee's job would be to remove the "Application Barrier to Entry" for each type of application, one by one.

This is the only way I can envision returning competition to what is today the almost all-encompassing area of an "Operating System". The only other suggestion I have heard that even attempts to restore competition would be to split Microsoft into several "Baby Bills" - smaller companies that all share the rights to Windows. I doubt that that would work. For starters, all employees could simply quit and all one company - perhaps on

their first day, and perhaps all join the company led by Bill Gates.

Conclusion: Breaking Up Microsoft is the Only Way to Restore Competition

In conclusion, I do not take proposing a breakup of what's probably the worlds most successful company lightly. But I think the situation now parallels the situation with AT&T before divestiture. There was no real long-distance competition then, and there is no real operating system competition now or in the foreseeable future. While AT&T was prohibited then from entering new markets (like local service), Microsoft is not restricted from extending the OS into all sorts of other software markets.

While there was a fairly clear distinction between long-distance and local phone service for AT&T, there is no such clear technical boundary between an operating system and an application. We can be sure that if left unchecked, Microsoft will continue to extend Windows into all sorts of other areas. In fact, all the Microsoft employees in all their testimony where careful never to rule out any software as potentially being part of the OS. The best we can do is basically to say "If there was, is, or could be a market for it outside of the operating system, then we must eliminate the barrier to that market's existance: force its removal from the Windows operating system."

Part 3: Deterence: Levy a Heavy Fine

Aside from the structural remedy I propose here and the contract and API-related remedies proposed in the PFJ, I don't understand why there is no punishment proposal in the PFJ, such as a heavy fine. I do understand (at a high level - I Am Not a Lawyer) that this is a civil case in which the goal is to stop the behavior and the criminal cases (such as the class action suit filed by states and the recently filed suit by AOL/Netscape) are meant to provide relief for the victims (consumers in the one case and a company in the other).

But it seems to me that the simplest, easiest to implement, and least controversial way to stop Microsoft from continued illegal activity would be to levy a heavy fine for its previous illegal activity. How large of a fine? Large enough that Microsoft executives would regret having done the illegal activities and would not do them in the future, simply on economic grounds. To this day, Microsoft executives say "We've done nothing wrong", and that may never change. The court can't change that, but the court can levy a fine that will cause them so say "...but we won't do it any more because it would be bad business."

Of course, calculating an appropriate fine would be very difficult, but here are some rough numbers to consider. Microsoft has several tens of billions of dollars in cash, and I believe roughly half is from the sale of Windows. Windows 95, 98, 2000, cost around $90, a little less when preloaded by an OEM. Microsoft's own trial testimony indicated that around $49 would have been a reasonable price for these products. (Microsoft enjoyed an 88% return on investment, compared to 13% for other industries). So multiplying a $40 "overcharge" by the number of copies of Windows 95, 98, and 2000 sold would give a ballpark figure of the amount of damages to consumers. Perhaps other versions of Windows (such as Windows XP) and their prices should be taken into account. Certainly, upgrade prices (as opposed to "complete versions") should also be considered.

I believe it would take a fine in the tens of billions of dollars for Microsoft's past illegal activities to be considered as having been a bad business decision. Such a fine would not be enough to put Microsoft out of business, but enough to do serious damage comparable to that suffered by Netscape.

Final Thoughts

Thank you for reading this document. I think input from the public, and from people in the software industry in particular, should be given very serious consideration considering the huge impact this ruling will have on the industry. I believe the Tunney Act included this comment period for just such a situation as we have today: when the Department Of Justice, for whatever reason, wishes to settle an antitrust case in a way that does no serve the public interest, the public should be heard.

References

[1] Proposed Final Judgement

[2] The Tunney Act

[3] Zimran Ahmed, Letter to the DoJ, 12/10/01

[4]SAMBA

[5] Computer & Communcations Industry Association, "US vs. Microsoft: A Trial Perspective"

[6] James Barksdale Letter to Chariman Leahy and Senator Hatch

[7] Epstein Becker & Green, The Unfolding Microsoft Drama: Shattered Windows:

[8] On the Proposed Final Judgment in United States v. Microsoft

[9] BBC News: Microsoft Settlement Search Continues

[10] Deposition of Bill Gates, December 15th, 1998

[11] United States vs. Microsoft Remedies Papers

[12] BRIEF ON REMEDY OF AMICI CURIAE COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION AND SOFTWARE AND INFORMATION INDUSTRY ASSOCIATION

[13] Is It Too Late To Split Microsoft In Three?

[14] Microsoft Remedy Redux